

2/7/2011

Morality, Care, and International Law

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In 1967, the influential international law scholar Louis Henkin wrote that “in relations between nations, the progress of civilization may be seen as movement from force to diplomacy, from diplomacy to law.” (Henkin, 1968, 3) He expressed the hope that norms of wide acceptability might achieve “that sense of obligation and habit of compliance” that we associate with law and that promote and reflect stability and order (3). He also expressed the disillusionment and skepticism he was compelled to feel at the lack of progress in this direction at that time. Perhaps we are not much further along more than 40 years later, but perhaps the *moral* case for international law remains as strong, if different in important ways. And we can work to increase what is aptly described as “the normative pull of law” in the international domain.

New developments toward globalization and global interconnectedness strengthen the case for international law, but the *status* of international law is much in dispute at the present time. International law is attacked by many conservatives, questioned by many liberals, and dismissed by many on the left.

Even within the domain of legal thought, there is a lack of support for international law. As Jack Goldsmith and Daryl Levinson write, “international law has long been viewed with suspicion in Anglo-American legal thought. Compared to the paradigm of domestic law, the international legal system seems different and deficient...” (Goldsmith and Levinson, 2009, 1).

Thomas Nagel argues that the *most* important task for political theory today is to find “workable ideas” about justice in the domain of global or international institutions (Nagel, 2005). But he himself undermines any realistic hope for international law, accepting the Hobbesian idea that there can be no justice or law until there is sovereignty with a monopoly of force.

There are many good reasons to consider international law as the best, if limited, hope for the relatively near future to further our shared goals and avoid the worst horrors of violence and war. Many discussions of global governance proceed as if we already had something like global peace and could proceed to concern ourselves with global democracy and accountability, but it seems premature to assume we have overcome large scale violence. I will argue here for international law *as it has developed* rather than as an ideal construct. International law should thus be understood as composed of customary law as well as of treaties and conventions (Byers and Chesterman, 2003). And I’ll argue for it on a novel basis: on the basis of a feminist ethics of care. It’s not novel to argue for international law on moral grounds, but those grounds are usually some version of Kantian ethics or social contract theory, or of utilitarian consequentialism. My argument will be different.

A number of philosophers have considered the status of international law with respect to *human rights* and have defended universal moral norms in this context

(Benhabib, 2009; Gould, 2004). I will focus instead especially on international norms concerned with *avoiding violent conflict*. I'll ask about the status that we ought, morally, to accord to international law, and I'll consider the grounds on which we ought to make this decision.

The Case for International Law

A first question that must be addressed is: what is the status of the state at the present time? Are states with sovereignty obsolete? Or are they simply there for international law, at least potentially, to apply to?

A number of theorists discern a "post-sovereign world" (Barber and Kim, 2009; Mostov, 2010). They suggest that sovereignty has been superseded in a world of global interconnections. We can agree that the power of powerful states is often undermined by recent developments. States with the most massive armed forces and most sophisticated weapons are often unable to impose their will on the recalcitrant, who respond with terrorism and subterfuge. And states have grave difficulties controlling their borders. However, we are often forced to observe that states still have the power to cause monumental trouble, extraordinary suffering, and hideous numbers of deaths. They still have ample ability to undermine any nascent order that is developing in the world. The current system of nation-states can be described as hierarchical (Castles, 2005), but it is still a hierarchy of states. As long as states are capable of action, especially violent action, we need law to restrain what they do.

So let's confront the skeptics who ask, legitimately, why should anyone have any respect whatsoever for international law? Let's begin with the patriarchal taint. Consider what Catharine MacKinnon says about even the best of law: "In the liberal state, the rule of law – neutral, abstract, elevated, pervasive – both institutionalizes the power of men over women and institutionalizes power in its male form" (MacKinnon, 1989, 238). It is even more true of international law than of the law that demands compliance within states that it reflects the male point of view (Charlesworth, Chinkin, and Wright, 1991). International law results from war, statecraft, diplomacy, and relations between states, which have been dominated by men and not women to an even greater extent than have the internal governance and regulation of states.

Then there is the taint of the relative power imbalances between existing states. States have come about as a result of war, imperialism, and the strong imposing their will on the weak, not social contracts. International law even more than law within states reflects what the powerful want. Within states, powerful interests structure law to their own advantage but democratic forces often temper the sway of the powerful and influence the way law evolves. At the international level, small and weak states have no comparable leverage. Wherever they have an equal vote as in the General Assembly of the United Nations, their puny influence is often dismissed by powerful states. And the arguments that all states are morally equal are not persuasive even to those who concede that all citizens are morally equal.

Many on the left see international law as a tool serving neocolonial interests in interference. Noam Chomsky says of the international law community and international law professionals that "most have to construct complex arguments to justify crimes of aggression. Their job, basically, is to serve as defense counsels for state power" (Chomsky,

2005, 75). If they are honest, he continues, they dismiss international law and the UN Charter as “hot air,” that should not restrict the ability of the U.S. to use force.

Among many conservatives, there is outright hostility to international law. In 2005, Supreme Court justice Antonin Scalia famously railed against the possibility that US courts might be unduly influenced by foreign decisions, and argued that it would clearly be wrong for the Supreme Court to take the “views of foreigners...as part of the reasoned basis of its decisions” (Roper v. Simmons, 2005, Justice Scalia dissenting). In 2009, as Judge Sonia Sotomayor was being considered for confirmation to the Supreme Court, the senior Republican on the Senate Judiciary Committee, speaking for many conservatives, sought to defeat her nomination because, he claimed, she accepted “the novel idea that foreign law has a place in the interpretation of American law...” (Herszenhorn, 2009). Many conservatives also vehemently oppose letting considerations of international law interfere with US foreign policy.

Then there is the resistance of liberal theorists who, like Thomas Nagel, maintain that international norms of justice lack the legitimacy that can only be found within democratic states. Their arguments can be as disparaging of international norms as the arguments of conservatives. Nagel argues, for instance, that justice is only applicable *within* sovereign states where decisions are enforced and a Rawlsian system of cooperation is possible (Nagel, 2005). International law, on this view, consists of little more than quasi-contractual agreements that some sovereign states may, or may not, choose to enter into.

Finally, there is the huge problem of compliance. Law, to even *be* law, requires compliance. Compliance is achieved within states by enforcement and by the willingness of citizens to accept law even when enforcement is weak. Nothing comparable can be said on the international scene, where enforcement is uncertain and often arbitrary and where powerful states flout international law almost at will. George W. Bush’s invasion of Iraq was only one glaring example.

Many of the arguments against international law are powerful. But starting with the feminist objection, let’s run the arguments in the other direction, looking for reasons to support international law rather than to dismiss it. Feminists who criticize liberal law as reflecting male dominance *of course* want to reform and improve law, not abolish it. They may want law to play less of a role in society in comparison with, say, social services. But they know well that if the law did not put even the most violent batterers of women and children in jail, things would be worse than they are. Without the help of the law in overcoming discrimination, doing so would be even slower than it is. So of course feminists support law and can see the good reasons to support international law.

To radicals, one can argue that far from merely reflecting neocolonial aims, international law often restrains them. U.S. displeasure with leftist governments in Latin America, for instance, would have been even more violent without the norms of international law. To liberal objections, one can point out that despite Rawlsian illusions of nearly just societies, domestic law does not overcome the actual power imbalances that exist within states. Law can, however, do much to weaken such imbalances and mitigate their effects. It *could* do so on the international level on a much larger scale, and it can build institutions to temper the dominance of mere power. To conservatives, one can say that their objections ignore the realities of global interdependence. And good arguments are good arguments wherever they originate.

To the legal skeptics, one can point to how international law actually works. In their long article in the *Harvard Law Review*, Goldsmith and Levinson reduce the suspicion of international law by showing how all those features that supposedly make international law deficient are actually shared by constitutional law, yet constitutional law, which “sits securely opposite international law on the domestic side of the divide,” is accepted as governing the behavior of states and governments (Goldsmith and Levinson, 2009, 2). So, one can conclude, should international law be accepted.

This leaves the compliance gap as a major objection, but compliance is already not negligible, especially in certain domains (Luck and Doyle, 2004; O’Connell, 2008). A recent book on international law that focuses on compliance divides international law into three clusters: 1) That concerned with human interests (e.g. human rights and humanitarian concerns); 2) that where states’ interests are transnational (e.g. environmental concerns, global health, and crime issues); and 3) that involving national interests such as security and economic prosperity. It can be shown that compliance can be quite impressive in the middle cluster, where states have a common interest in resolving transnational problems (Luck and Doyle, 16) Norm development has been impressive in the area of human rights, but since the norms restrict and burden governments in favor of individual persons, compliance has been poor. And in the third cluster, where core national interests in security and prosperity are involved, powerful states tend toward unilateralism and toward the coercion of weaker states, seldom letting international law interfere with their pursuit of what they take to be their national interests. So what one concludes about compliance depends importantly on what sorts of issues one looks at. And much more can be done to persuade states that all have a common interest in resolving conflicts and thus promoting compliance.

In the case of the administration of George W. Bush, international law was not overridden reluctantly or apologetically. Overriding it was almost the point. As one evaluation by several authors puts it, “the invasion of Iraq was meant . . . to demonstrate what anyone with the temerity . . . to flout the authority of the United States could expect from us . . . This was to be a grand display of ‘shock and awe’ unrestrained by . . . the international laws and courts that the rest of the world uses to hobble American power” (Simic, 2010, 8). This was, however, something of an aberration in US foreign policy: since World War II the U.S. had, though with exceptions, generally promoted the rule of law in international relations (Franck, 2006; Taft, 2006). And the Obama administration has clearly resumed an overall stance of respect for international law.

Raising the question of compliance just returns us to the question with which we began: Why *ought* we to respect international law? If citizens and states in general agree that we should, greater compliance can be achieved. And we can work to make some issues not now receiving much enforcement support more like those that do. For instance, every society needs to deal with questions of the rights of minorities, the rights of women, and where to draw the lines between religion and the state. As they learn from one another how it can be done and what solutions seem to work, they may see it as in their interest to coordinate responses to pressures to, say, grant women rights that clash with some religious traditions, or ban religious symbols in public forums, or add new religious holidays. With respect to violent conflict, all states have an interest in containing it.

Grounds for Decision

What help can we get from political theorists of the past in deciding what our positions on international law ought to be? Of course one could draw inspiration from the 17th century Dutch thinker Hugo Grotius (1583-1645), the so-called “father of modern international law.” But Grotius does not have much independent influence on contemporary moral and political philosophy: Rawls, for instance, does not even mention him. So let’s consider some other sources.

Kant argued for international law as an extension of the social contract from within a state to its relations with other states. From his commitment to rationality, Kant derived his recommendations that persons ought to form republics and that republics ought to enter into a league of nations. Such states ought to pledge to establish peace between them, and the Law of Nations should thus be founded on “a federation of free states” (Kant, 16). He writes: “reason, from its throne of supreme moral legislating authority, absolutely condemns war as a legal recourse and makes a state of peace a direct duty, even though peace cannot be secured except by a compact among nations” (18). Nations not entering the compact remain, in Kant’s view, in a Hobbesian state of nature where “the natural state is one of war. This does not always mean open hostilities, but at least an unceasing threat of war” (10).

Kant thus advocates a multilateral non-aggression treaty between republics. This provides little guidance, however, for how states ought to act toward those remaining in a state of nature or how actual states not party to such a pact, or not republics, ought to be expected to behave.

For Kantian cosmopolitans, only individual persons have rights and states or nations have no moral claims to respect except insofar as they serve their individual citizens (Brock, 2009; Pogge, 1992). It seems to follow that states that do not respect the rights of their citizens have no right to non-intervention. States upholding their citizens’ human rights and entering into an international compact to refrain from aggression against one another may treat those that do not as illegitimate, and may intervene, including militarily, as they see fit in the affairs of such outsider states. Practical considerations may often argue against such intervention, but moral principles do not in the Cosmopolitans’ view (Beitz, 1979). This is a questionable formula for peace or foundation for international law as it has evolved. Actual international law has favored peace and stability over the forceful promotion of individual rights (Hehir, 1995; Chesterman, 2001, Chapter 2).

Rawls, following Kant, also extends the social contract to the international domain, expanding the social contract to a Society of Peoples. He tries to provide a rational reconstruction of actual international law, but whether the exercise connects with international law as it has developed is questionable. Like Kant, Rawls derives his recommendations from the more fundamental moral concepts of reason and justice. In *The Law of Peoples*, Rawls says his basic idea is to follow Kant’s lead, which he interprets as meaning “that we are to begin with the social contract idea of the liberal political conception of a constitutionally democratic regime and then extend it by introducing a second original position at the second level, so to speak, in which the representatives of liberal peoples make an agreement with other liberal peoples...and again later with nonliberal though decent peoples” (Rawls, 1999, 10). Thus international law, in Rawls’ view, ought to be based on ideas of justice and rationality and ought to be respected because of this.

Rawls makes the important concession to reality of allowing those entering the contract to be peoples who need not all be liberal. If they are decent, but not liberal because they are hierarchical or promote a comprehensive conception of the good, they too can enter the international contract. But he sees those outside the realm of liberal or decent peoples as being outlaw states, and does not provide moral restraints on military intervention against them. "Liberal and decent peoples," he writes, "simply do not tolerate outlaw states." They "have the right, under The Law of Peoples, not to tolerate outlaw states....all peoples are safer and more secure if such states change, or are forced to change, their ways" (Rawls, 1999, 93). Rawls is dismissive of the moral issues involved in deciding how to bring states to the goal of honoring the law of peoples, saying these are questions of "foreign policy" about which political philosophy has little to say. It seems to some of us grappling with the problems of morality and international relations, on the contrary, that moral and political philosophy should exactly address questions of what we ought to do here and now in a world carved up into states not all of which are liberal or even decent and in which violence by states and non-state groups is a constant threat.

Rawls has been criticized by cosmopolitans for his tolerance of peoples who may not be liberal and may not respect the full complement of liberal rights (Teson, 1995). But he can also be criticized by realists who doubt that what representatives of liberal and decent peoples would agree to in a second level original position has much relevance to what policies states ought to adopt when there are no veils of ignorance and they know a great deal about how much or how little power they can bring to bear on pursuing their interests.

Turning now to utilitarian arguments, can they provide firmer support for international law? Utilitarian arguments can point to the utility of international law in promoting peace, security, and the furtherance of common interests. It can be argued that consequentialism is a weak foundation for law of any kind (Held, 1989), but this cannot be argued here. The more pressing problem is the question: utility for whom? If it is the utility of the members of powerful states, utilitarian arguments for international law will offer few restraints as such states rationalize their pursuits of their interests by imposing their will on weak states and populations. The history of imperialism is replete with purported justifications of the interests of the dominant. Such states use international law when it serves their purposes and ignore it when it does not. They dismiss it as a threat to what they proclaim their security requires.

If, on the other hand, it is the utility of everyone that matters, as utilitarian moral theory advocates, this still requires interpretation that invites distortion. Utilitarianism has few resources for guarding against insensitivity. John Stuart Mill's enthusiastic support of the civilizing mission of Great Britain in its 19th century imperial phase must give pause to how utilitarian arguments will be applied. Mill said that nations that are still barbarous "have not got beyond the period during which it is likely to be for their benefit that they should be conquered and held in subjection by foreigners" (Mill, 118). Echoes of such views in the statements of advisers in the administration of George W. Bush on why the U.S. *ought* to use force against resisting states are troubling.

Even if we consider pure moral theory rather than how it has been applied, the outlooks of Kantian moral theory and of utilitarianism are a lot less universal than they claim to be. And they leave gaps between theory and practice that are almost impossible to fill.

A better source of inspiration for thinking about international law than either Hobbes or Kant, (or Mill or Rawls), might be Locke. For Locke, the state of nature was not necessarily a state of war, for either individuals or states. In the absence of an authoritative power providing adjudication and enforcement of law, peace was precarious, but it was still peace, and the moral norms of the laws of nature were still valid, for Locke. Hobbes, in contrast, held that such norms, without enforcement, were nothing but words – empty words. But for Locke they were valid norms creating obligations.

As Michael Doyle notes, “nothing short of world government removes Hobbesian states from the state of war” (Doyle, 1997, 219). For Locke, in contrast, the state of nature is full of “inconveniences,” but in the absence of an outright act of aggression, states are in a condition of peace, and “in peace, natural law – now international law – should rule” (219). One can argue, with Locke, that states have an obligation to abide by international law even in the absence of being compelled to do so, and this seems the appropriate stance to hold with respect to international law. Michael Doyle and Geoffrey Carlson conclude, “of Hobbes, Kant, and Locke, it is Locke who provides the firmest theoretical foundations for an international law open to all states that are willing to abide by it” (Doyle and Carlson, 2008, 666). But, we should add, it is not just law for those who agree to it; international law, on the Lockean view, *applies* to states whether they agree to it or not. The *moral* norms of international law are *valid* even if they are not yet enforced, just as, for Locke, the Laws of Nature are *binding* on individual persons even in the state of nature.

A Questionable Analogy

All these views depend on accepting a strong analogy between the state and the individual. States are treated as if they were equal individual persons. Locke’s views are more fruitful than those of the other theorists considered, but they are still limited by this analogy. It underlies *most* of the past and current philosophical thinking about morality in international relations. The implication has all too often been drawn that morality requires world government for states as it requires government for citizens, and that in the absence of world government, morality is powerless or has no applicability, even though both Kant and Rawls warn against world government.

Philosophers would do well to pay more attention than they usually do to Grotius, and Vattel, an 18th century Swiss thinker, and to others who have actually influenced international law *as it has developed*. Grotius argued that international law and domestic law are parts of a unitary system based on moral law, and that war can be waged for self-defense and to right wrongs but not for revenge. The Natural Law baggage need not be a problem for our view of Grotius any more than it is for Locke. Grotius made such points as that God cannot make two plus two not equal four, or an evil act not be evil. Substituting reason for God, and adding human experience, adequately yields Grotius’ conclusions. Philosophers would also do well to listen to those engaged in the actual practices of law and diplomacy, with experience of how normativity matters. It is the *idea* of the social contract between individuals, however, that has dominated the philosophical discussion.

In his essay on how to achieve perpetual peace, Kant speaks of states as being, in the absence of a compact between them, in a state of war like that assumed to exist between individual persons before they enter into a social contract. The Hobbesian picture is unmistakable, as it is in a vast amount of writing about international relations. But to what extent does this analogy represent reality? Or even have plausibility?

It is not hard to cast doubt on the picture of the Hobbesian state of nature even for thinking about the internal situations of states. The picture represents persons as having sprung from nowhere like mushrooms (which was Hobbes' own metaphor) with no notice of persons having been born of mothers, and having received a huge amount of care before attaining whatever measure of independence they have (DiStefano, 1991, Held, 1993). It takes no notice of the heavy social ties of relations between parents and children, and of the groups in which they live, on which any speculation about individual persons must rest. And when it is suggested that it is intended as a basis for normative inquiry into what free and equal individual persons *would be* justified in agreeing to, and not intended to represent reality, then the question arises of why we should suppose the normative conclusions of this inquiry *apply* to the reality of persons in groups. And if this doubt is a problem for thinking about the relations of persons *within* a state, it is even more powerful when thinking about the relations of states with one another. States *are not* individual human persons, and they hardly resemble them at all.

Consider the question of value. Certainly states do not have, and are not thought to have, the *same*, and perhaps not even comparable value as individual persons. Some theorists dismiss states as of *no* value in themselves, and of only instrumental value in what they can do for individual persons. Included in this group are those untroubled by the inconsistency of using the state/individual analogy for thinking about international agreements and then abandoning it when thinking about values. Others can acknowledge that as a state exists, it represents a uniting of people into an entity – the state – and that this entity has *some* value. But it certainly isn't *like* the value of an individual human person. The question of value is confusing and uncertain, but it contributes to seeing how questionable are arguments that rest on the analogy of state and person. On the other hand, respecting the integrity of states as they exist in all their inequality and unfreedom, may hold out hope for persons to overcome the scourge of war in all its bloody violence.

A better analogy than that between state and individual person may be that between state and group. At least it provides a useful basis for exploration of new ways to think about how international norms should apply in the global arena. Recent work on group rights shows how one might think about groups and about the rights of states to respect and consideration (Kymlicka, 1995; Schmitt, 2003). Within states, groups are not all equal and this is much closer to the reality of interstate relations than the fiction of state equality. Which traditions structure national life, which practices shape national institutions and policies, which languages are used and recognized, all depend on the size and influence of groups. Minorities are due respect but not equal influence. They have rights to not be destroyed or to have their cultures eliminated. But groups are not all equal, and their powers are perennially contested. As Thomas Christiano argues, “we need to develop a conception of fair deliberation and negotiation among groups that we currently don't have...” (Christiano, 36). Groups do not have equal rights or an equal influence in shaping law or policy or determining the actions of states. The rights of groups are not the same as those thought to be enjoyed by individuals. And this resembles more meaningfully relations in the international arena than does the fiction of state equality.

The Security Council of the United Nations, rather than the General Assembly, reflects the realities of powerful states having far more influence than weak ones. But it is notoriously difficult to connect Security Council decisions with international moral norms. The UN charter restricts the use of force by states to self-defense and, with Security

Council authorization, to collective action to maintain or restore peace and security. The Security Council is supposed to enforce the UN Charter's norms restricting the use of force and to take measures necessary to secure peace. But how it is to do this is a political decision and its decisions are in fact based largely on the interests of states. The Charter's prohibition on the use of force has been declared dead by some (Franck, 1970; Glennon, 2002), though many disagree. The Security Council has been considered dysfunctional, or incapable of doing its job, or as having a "propensity for paralysis" (Feinstein and Slaughter, 2004). Again, many disagree, but how the Security Council functions has depended more on political realities than on legal, never mind moral, norms. But this could change under the influence of enhanced respect for international law.

Traditional political theory may be a weak foundation on which to build the case for international law. If we turn, then, from political theory to traditional moral theory, we may conclude that Kantian moral theory and utilitarianism are even further from reality and have even more difficulty applying effectively to international relations. So let's consider the ethics of care.

The Ethics of Care

The ethics of care is a new moral outlook. It has the potential of becoming a comprehensive moral theory that could be an alternative to Kantian ethics and utilitarian consequentialism (Held, 2006). Starting with the work of Sara Ruddick, Carol Gilligan, and Nel Noddings in the 1980's, it has been developed into a widely discussed and influential new approach to moral issues (Ruddick, 1980, 1989; Gilligan, 1982; Noddings, 1986).

This new outlook is capable of providing guidance for the full range of human relations, from our closest relations in contexts of families, friendship, and small groups to our most distant relations in political and even global society. Dominant traditional theories such as Kantian ethics and utilitarianism may continue to be appropriate for many of the problems that arise within legal or political systems when such problems can be thought of as internal to these. But these ways of interacting should be seen as embedded within a wider network of human relations that ought to be caring relations. Within such relations we can decide to treat given kinds of interactions as legal or political. But the moral theories appropriate for legal and political interactions are much less satisfactory than they have been thought to be when they are presented as comprehensive moral theories, as they have been. For instance, when violence arises within a state and is dealt with in legal and political ways, the traditional moral approaches may remain suitable. But for the more fundamental evaluation of such legal and political practices and the laws and institutions they embody, and for the guidance of groups and states and the violence they now employ, and of persons as members of a global community rather than just as citizens of given states, the ethics of care shows more promise.

To the ethics of care, caring relations between persons are especially of value. This is most easily obvious in the case of personal relations between friends or members of families or small groups. Understanding the fundamental values of caring relations can be extended to valuing caring relations between all persons. The ethics of care emphasizes the values of empathy, sensitivity, responding to need, and trust. These are not confined to the context of the personal.

The ethics of care is based on an appreciation of the traditionally overlooked and enormous amount of caring labor necessary for human survival and development, and of the values incorporated into caring practices. Instead of building ethics on the model of the independent, self-sufficient liberal individual, the ethics of care understands persons as inherently relational and interdependent. It fosters such practices as building trust, responding to actual needs, and dealing with conflict nonviolently. The ethics of care attends as closely to the points of view of recipients of care as of care providers, thus avoiding paternalism. This equips it to guard against imperialistic policies and the tendencies toward domination that strong states exhibit.

Some critics have interpreted the ethics of care as a conservative ethic, affirming women's traditional role as provider of care. But this is a mistaken view. The ethics of care does indeed appreciate women's experience, but it is a feminist ethic that calls for the transformation of the most fundamental domination, that of gender, and for an end to domination itself. It advocates the overhaul of caring practices that are oppressive to women and paternalistic to recipients of care. It is built on an understanding of the values of care and it promotes caring practices for men as well as for women.

To the ethics of care, care is a value as important as justice, and probably more fundamental. No one can survive without care; the same cannot be said of justice. The ethics of care is built on experience that really is universal, the experience of having been cared for, at least as a child, and on the experience of those providing care. It has no need to appeal to religious views that are divisive or to the individualistic outlook of theories that only claim to be universal. Within the weaker relations of care that can be formed with distant others, we can well develop legal and political ways to interact for which more traditional moral theories in which justice is primary can be suitable. Care and its values, however, should remain fundamental. To care whether their rights are respected or not, we need to care sufficiently for distant people. To actually meet the needs of persons so that they can survive and improve their lives, care is essential.

Care and International Law

The ethics of care, one can conclude, would strongly support respect for international law. What are dismissed as mere "prudential considerations" and "considerations of international stability" in much of the literature on military intervention (Laberge, 1995) would, for the ethics of care, be at the center of attention. The ethics of care focuses on the needs of actual, vulnerable, helpless persons in actual historical contexts. It would be much more respectful of the need to keep the peace and avoid violent conflict than those theories focused on abstract justice for all. Like international law as it has actually developed, it would be close to the realist position of taking empirical realities of state power and interest as given. It would not dismiss prudential considerations as of little relevance to the morality of international relations. But unlike realists, it would seek *moral* recommendations for dealing with a world divided into highly unequal states, states that are seldom free of outside coercive pressure.

It would take international law as already developed as enormously helpful for avoiding violent conflict and minimizing problems leading to war. The argument would not be a simple consequentialist one, appreciating the utility of international law for

avoiding violence, although that would be included. It would also appreciate international law as expressive of the values of care and concern for actual, fragile persons.

As already developed, international law respects the sovereignty of states regardless of their internal virtues. This sovereignty is by no means absolute: it is limited by such recent norms as the Responsibility to Protect, and the norm that developed in the break-up of the former Yugoslavia holding that states resisting groups seeking national self-determination should avoid the use of force as should the groups seeking independence. But international law is appropriately respectful of sovereignty and cautious about allowing military intervention except in exceptional circumstances such as genocide or large-scale ethnic cleansing.

Consider the arguments for military intervention in Rwanda, Bosnia and Kosovo, and Iraq. International law as so far developed has, in these cases, recommended what may well be thought to be reasonably correct positions on when military intervention might or might not justifiably be undertaken (Held, 2008, Chapter 2). International law would have allowed and possibly supported intervention in Rwanda to prevent the genocide that occurred there in 1994. It indicated retroactively that it considered the NATO intervention in Kosovo in 1999 permissible to prevent the ethnic cleansing in progress there. And it determined that the U.S. invasion of Iraq in 2003 was a clear and unjustified violation of international law. These are arguably the correct judgments to be made of these uses of military violence (but see Chesterman, 2001; Holzgrefe and Keohane, 2003).

Developing states understandably ask for *respect*, which translates into respect for their sovereignty, as an indication that the days of imperial domination of the weak by the strong are waning. The strength of such national feelings needs to be acknowledged. International law as so far developed has the advantage, in comparison to more ideal moral theories of international relations, that it does respect the integrity of states. It does not obligate them much, though it does obligate them to some extent, beyond what they agree to here and now, rather than what representatives of their peoples can be imagined to agree to from an imagined global original position. Such imagined positions may have little influence or even relevance in the situations in which states find themselves at actual historical moments. This stance on the part of international law as so far developed increases the chances for growing compliance with the norms of international law. The ethics of care would appreciate these advantages.

For both Kantian and utilitarian moral theory, there are individuals on the one hand and “all persons” or “everyone” on the other. Groups between these are relatively invisible. Such views ignore the national boundaries and group loyalties that affect so strongly the realities of international affairs. The world is rife with local loyalties. The ethics of care, far better than such other moral theories, understands the ties of groups, from families to nations.

It seems clear from almost every perspective that in a world dominated by states striving to promote their own interests and threatened periodically by terrorism and war, the rule of law and thus international law ought to be promoted. This can be demanded on many moral grounds, such as Kantian ethics and utilitarianism, but it can be even more strongly recommended by the ethics of care.

On the other hand, as an advocate of the ethics of care, one can hold that law is not as much of an answer to the problems and conflicts of the world as many theorists supporting greater compliance with international law think it is. From the perspective of

care, law is a limited approach for a limited domain of human activity. For that domain, it may be the best hope in the short run for escaping the worst impending disasters of imperialist delusions, religious fanaticism, and conflicts between states and groups. As we look ahead, however, to how the world needs to progress toward something better than an aggregate of states and groups all pursuing their own interests and ready to use violence, at best within the restraints of international law, the ethics of care offers hope of something more satisfactory, and of ways to move towards it. Such thinking is highly compatible with the interdependence between states and other groups increasingly understood by many persons thinking in global terms.

The ethics of care encourages states and other organizations to take responsibility for protecting vulnerable populations and for promoting peaceful resolutions of conflicts. Negotiating disputes non-coercively and addressing the problems of those politically disenfranchised or exploited can clearly become practices of care. Properly developed, they should make the need for military intervention, for forces to keep the peace between warring groups, and for enforcement of the reasonable restraints of law to which all can become accustomed, ever less demanded.

Instead of focusing on rules to be followed and violations to be punished, the ethics of care would attend to the political and social and economic problems that make the rules so often inadequate in their protection of actual persons and groups. And instead of relying on military intervention to punish violators of the norms of international law, the ethics of care would counsel preventive engagements and measures aimed at deflecting violations and undercutting the need for punishments (Robinson, 1999, 2006; Tronto, 2007).

As the ethics of care requires not only transformations of given domains – the legal, the economic, the political, the cultural etc. – within a society, but also a transformation of the relations between such domains, so would it in the global context. Taking responsibility for global environmental well-being would become among the central concerns of a caring global policy. Fostering the kinds of economic development that actually would meet human needs and enable the care needed by all to be provided would also be seen as of primary importance. Ecofeminists, for instance, offer an ethic of care for nature and call for a radically different kind of economic progress. They ask that development be sustainable, ecologically sound, non-patriarchal, non-exploitative, and community oriented (Mies and Shiva 1993). Fiona Robinson and others consider how care work can be justifiably apportioned on a global scale. Unlike the current global marketplace that results in vast migrations of care workers from poor countries who leave behind their own families to care for the children of the rich or staff care facilities for the ill and elderly or become sex workers, the ethics of care asks that all persons have the ability to provide and to receive care (Robinson, 2006; Mahon and Robinson, forthcoming).

Care and Global Concerns

The thinking that is developing among care theorists is highly compatible with various trends being discerned in the progress of globalization, for instance the trend toward global governance based on networks of governmental officials identified by Anne-

Marie Slaughter (Slaughter, 2004), the development of global civil society described by John Keane (Keane, 2003), and the growth of NGO's and their activities. It seems compatible also with the hopes for global governance based on cities as building blocks being speculated about by others (Sassen, 2008; Barber, 2010).

Those thinking about such trends are usually not yet influenced by the ethics of care, but the insights and guidance of care ethics would enhance the activities of participants in global groups, and the work of theorists analyzing such developments.

Anne-Marie Slaughter describes networks made up of governmental officials from agencies in different states who consult with their counterparts to devise policies to address their common problems, not only within the European Union but elsewhere as well. She interprets their activities as constituting a kind of global governance as they work together to deal with such problems as environmental regulation, food safety concerns, and achieving financial stability. Slaughter argues that such networks "build trust and establish relationships among their participants that then create incentives to establish a good reputation and avoid a bad one. These are the conditions essential for long-term cooperation" (Slaughter, 3). In her view, these networks are able to foster compliance with norms. "They can bolster and support their members in adhering to norms of good governance at home and abroad. . . They can enhance compliance with existing international agreements and deepen and broaden cooperation to create new ones" (33).

John Keane describes a "global civil society" he sees emerging composed of a "bewildering variety of. . . INGO's, voluntary groups, businesses, civic initiatives, social movements, protest organizations" that work across national boundaries (Keane, 2003, 18). This global civil society, as he see it, "champions the political vision of a world founded on non-violent, legally sanctioned power-sharing arrangements among many different and interconnected forms of socio-economic life that are distinct from governmental institutions" (xi-xii).

Others note the growth of women's activism through nongovernmental organizations (Tickner, 2001). And Richard Falk discerns a "globalization from below" through transnational social movements such as the environmental movement and movements against the harmful effects of corporate globalization (Falk, 1993). These trends could support the increased global influence of care and its values.

It may always remain necessary to have some enforcement of law, within states and between them. The ethics of care does not exclude the use of violence as a last resort, though international enforcements should not be carried out unilaterally (Doyle and Sambanis, 2006). The ethics of care is entirely capable of dealing with violence (Held, 2010). But as caring relations are adequately developed and caring practices adequately supported within states, the need for enforcement to gain compliance with reasonable rules and requirements can decrease. One can expect the same in global interactions between states.

The considerable efforts that have been made in recent years to promote human rights, including the rights of women, ought certainly to be supported at the current stage of globalization. But in a world characterized by the values and ties of care, with waning poverty and exclusion and growing attention to the flourishing of all, where states would take responsibility for environmental well-being, appeals to the legal approaches of human rights might become less important.

When violence is not contained by the legal and political bounds that seek to mitigate its multiple damages, the ethics of care can offer insights on what to do. In dealing with violence in families, and with violence between states and violent groups, one can be guided by many similar moral considerations: to deter and restrain rather than obliterate and destroy; to restrain with the least amount of necessary force so that reconciliation remains open; in handling violence, to cause no more damage and pain to all concerned than is needed (Held, 2008). As Sara Ruddick has recently written, “Many mothers know what many military enthusiasts forget – the ability to destroy can shock and awe but compelling the will is subtle, ultimately cooperative work” (Ruddick, 2009, 307).

As war and other violence kills children, mutilates young bodies, causes terror, horror, and extraordinary pain, any morally responsible person should aim to understand how best to reduce it. The ethics of care can help us in understanding how to do so, and in motivating us to try.

One can conclude that the ethics of care would clearly support international law as it has developed but it would support even more strongly the caring cooperation that would decrease the need for law and its enforcements.

References

- Barber, Benjamin R. 2010. “Can Democracy Survive Interdependence?” Demos Working Paper
- Barber, Benjamin R. and Sungmoon Kim. 2009?. “A New Paradigm for Global Governance.” Typescript.
- Beitz, Charles R. *Political Theory and International Relations*. Princeton, NJ: Princeton University Press, 1979.
- Benhabib, Seyla. 2009. “Claiming Rights across Borders: International Human Rights and Democratic Sovereignty.” *American Political Science Review*. November (691-704).
- Brock, Gillian. 2009. *Global Justice: A Cosmopolitan Account*. Oxford: Oxford University Press.
- Byers, Michael, and Simon Chesterman. 2003. “Changing the rules about rules? Unilateral humanitarian intervention and the future of international law.” In *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, ed. J. L. Holzgrefe and Robert O. Keohane. Cambridge: Cambridge University Press.
- Castles, Stephen. 2005. “Nation and Empire: Hierarchies of Citizenship in the New Global Order,” *International Politics*. 42 (203-224).
- Charlesworth, Hilary, Christine Chinkin and Shelley Wright. 1991. “Feminist Approaches to International Law,” *American Journal of International Law*. 85 (613- 645).
- Chesterman, Simon. 2001. *Just War or Just Peace? Humanitarian Intervention and International Law*. Oxford: Oxford University Press.
- Chomsky, Noam. 2005. *Imperial Ambitions: Conversations on the Post-9/11 World*. N.Y.: Metropolitan Books.
- Christiano, Thomas. 2010. “Is Democratic Legitimacy Possible for International Institutions?” Typescript. Quoted with permission.

- DiStefano, Christine. 1991. *Configurations of Masculinity: A Feminist Perspective on Modern Political Theory*. Ithaca, NY: Cornell University Press.
- Doyle, Michael W. 1997. *Ways of War and Peace*. New York: W.W. Norton.
- Doyle, Michael W. and Geoffrey S. Carlson. 2008. "Silence of the Laws? Conceptions of International Relations and International Law in Hobbes, Kant, and Locke," *Columbia Journal of Transnational Law*. 46: 3 (648-666).
- Doyle, Michael W. and Nicholas Sambanis. 2006. *Making War and Building Peace*. Princeton NJ: Princeton University Press.
- Falk, Richard. 1993. "The Making of Global Citizenship," in *Global Visions: Beyond the New World Order*, ed. Jeremy Brecher, John Brown Childs, and Jill Cutler. Boston: South End Press.
- Feinstein, Lee and Anne-Marie Slaughter. 2004. "A Duty to Prevent." *Foreign Affairs*. 83, [get page numbers for whole]
- Franck, Thomas. 1970. "Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States." *American Journal of International Law*. 64. [get pages]
- 2006. "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium." *American Journal of International Law*. 100 (88-106).
- Gilligan, Carol. 1982. *In a Different Voice: Psychological Theory and Women's Development*. Cambridge, MA: Harvard University Press.
- Glennon, Michael J. 2002. "How War Left the Law Behind," *New York Times*, Nov. 21, A37.
- Goldsmith, Jack, and Daryl Levinson. 2009. "Law for States: International Law, Constitutional Law, Public Law," *Harvard Law Review* 122: 1 (1-74).
- Gould, Carol C. 2004. *Globalizing Democracy and Human Rights*. Cambridge: Cambridge University Press.
- Grotius, Hugo. 2005. *The Rights of War and Peace*, ed. Richard Tuck. 3 volumes. Indianapolis: Liberty Fund.
- Hehir, J. Bryan. 1995. "Intervention: From Theories to Cases," *Ethics and International Affairs*. 9 (1-13).
- Held, Virginia. 1989. *Rights and Goods: Justifying Social Action*. Chicago: University of Chicago Press.
- 2006. *The Ethics of Care: Personal, Political, and Global*. New York: Oxford University Press.
- 2008. *How Terrorism Is Wrong: Morality and Political Violence*. New York: Oxford University Press.
- 2010. "Can the Ethics of Care Handle Violence?" *Ethics and Social Welfare*. 4:6 (115-129).
- Henkin, Louis. 1968. *How Nations Behave: Law and Foreign Policy*. NY: Praeger.
- Herszenhorn, David M. 2009. "Court Nominee Criticized As Relying on Foreign Law," *New York Times*. June 26, A13.
- Holzgrefe, J.L. and Robert O. Keohane, eds. 2003. *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*. New York: Cambridge University Press.
- Kant, Immanuel. 1957 (1795). *Perpetual Peace*, Ed. Lewis White Beck. Indianapolis, IN: Liberal Arts.
- Keane, John. 2003. *Global Civil Society?* Cambridge, UK: Cambridge University Press.

- Kymlicka, Will, ed. 1995. *The Rights of Minority Cultures*. New York: Oxford University Press.
- Laberge, Pierre. 1995. "Humanitarian Intervention: Three Ethical Positions," *Ethics and International Affairs*. 9 (15-35).
- Locke, John. 1988 (1690). *Two Treatises of Government*. Peter Laslett, ed. Cambridge, UK: Cambridge University Press.
- Luck, Edward C. and Michael W. Doyle, eds. 2004. *International Law and Organization: Closing the Compliance Gap*. Lanham, MD: Rowman & Littlefield.
- MacKinnon, Catharine. 1989. *Toward a Feminist Theory of the State*. Cambridge, MA: Harvard University Press.
- Mahon, Rianne, and Fiona Robinson, eds. (Forthcoming) *The Global Political Economy of Care: Integrating Ethics and Social Politics*.
- Mies, Maria, and Vandana Shiva, eds. 1993. *Ecofeminism*. London: Zed Books
- Mill, John Stuart. 1984 (??) *Essays on Equality, Law, and Education*. Buffalo: University of Toronto Press
- Nagel, Thomas. 2005. "The Problem of Global Justice," *Philosophy and Public Affairs* 33: 2 (113-47).
- Noddings, Nel. 1986. *Caring: A Feminine Approach to Ethics and Moral Education*. Berkeley: University of California Press.
- O'Connell, Mary Ellen. 2008. *The Power and Purpose of International Law: Insights From the Theory and Practice of Enforcement*. New York: Oxford University Press.
- Pogge, Thomas, 1992. "Cosmopolitanism and Sovereignty," *Ethics* 103 (48-75).
- Rawls, John. 1999. *The Law of Peoples*. Cambridge, MA: Harvard University Press.
- Robinson, Fiona. 1999. *Globalizing Care: Ethics, Feminist Theory, and International Affairs*. Boulder, CO: Westview Press.
- 2006. "Care, Gender and Global Social Justice: Rethinking 'Ethical Globalization'." *Journal of Global Ethics*. 2:1 (5-25).
- Roper v. Simmons*, 2005, Justice Scalia dissenting.
- Ruddick, Sara. 1980. "Maternal Thinking," *Feminist Studies* 6: 342-67.
- 1989. *Maternal Thinking: Toward a Politics of Peace*. Boston: Beacon Press.
- 2009. "On *Maternal Thinking*," *Women's Studies Quarterly*. 37: 3&4 (305-08).
- Sassen, Saskia. 2008. "Neither global nor national: novel assemblages of territory, authority, and rights." Open Access article. [What else?]
- Schmitt, Frederick, ed. 2003. *Socializing Metaphysics: The Nature of Social Reality*.

Lanham, MD: Rowman & Littlefield.

Slaughter, Anne-Marie. 2004. *A New World Order*. Princeton: Princeton University Press.

Taft, William H., IV. 2006. "A View from the Top: American Perspectives on International Law after the Cold War." *Yale Journal of International Law*. 31 (503–512).

Teson, Fernando R. 1995. "The Rawlsian Theory of International Law," *Ethics and International Affairs*. 9 (79-99).

Tickner, J. Ann. 2001. *Gendering World Politics*. New York, NY: Columbia University Press.

Tronto, Joan C. 2007. "Is Peace Keeping Care Work?" in *Global Concerns: Feminist*

Ethics and Social Theory, eds. Rebecca Whisnant and Peggy DesAutels. Lanham

MD: Rowman and Littlefield.